

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

RICKY SMITH,

Petitioner,

-vs-

WARDEN, Lebanon Correctional
Institution,

Respondent.

:

Case No. 1:11-cv-240

:

District Judge Michael R. Barrett
Magistrate Judge Michael R. Merz

ORDER

This habeas corpus case is before the Court *sua sponte* on consideration of the docket upon transfer from Magistrate Judge Litkovitz.

There is currently pending a Report and Recommendations (Doc. No. 15) filed by Judge Litkovitz and recommending that Petitioner's *pro se* Motion for Evidentiary Hearing (Doc. No. 3) be denied. In the opinion of the undersigned, a motion for an evidentiary hearing in a habeas corpus case is a non-dispositive motion which Magistrate Judges are authorized to determine, rather than making a recommendation to the assigned District Judge. Accordingly, the Report and Recommendations are WITHDRAWN.

Magistrate Judge Litkovitz's Report correctly sets forth the governing law. Applying that law to the Motion for Evidentiary Hearing, the undersigned concludes that Petitioner has not established his entitlement to an evidentiary hearing. Accordingly, the Motion for Evidentiary Hearing is denied without prejudice to its renewal by counsel upon compliance with the conditions

for such a hearing set in the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the “AEDPA”).

February 29, 2012.

s/ **Michael R. Merz**
United States Magistrate Judge

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